IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/09/2003

CORAM

THE HON'BLE MR.JUSTICE R.JAYASIMHA BABU
and
THE HON'BLE MR.JUSTICE S.K.KRISHNAN

W.A.No.611 of 2001

The Management of
Aurofood Private Limited,
Auroville 605 101. ..Appellant

-Vs-

1.The Presiding Officer,
Labour Court,
Cuddalore.

2.The Secretary,
Aurofood (P) Ltd.
Workers Union,
Auroville-605 101. ..Respondents

Appeal against the order of the learned single Judge, dated 13.12.20
00 passed in W.P.No.66 of 1994.

!For Appellant : Mr.Karthik
for Mr.T.S.Gopalan

^For 2nd respondent : Mr.Balan Haridoss

:JUDGMENT

(Delivered by R.JAYASIMHA BABU, J.)
The question raised by the employer/appellant is as to whether the learned single Judge of this Court was right in directing the employer to pay subsistence allowance to the dismissed workman during the pendency of the proceeding before the Labour Court. The workman Sukumaran was dismissed on 1.7.1988 without holding an enquiry into the misconduct alleged against him. A reference regarding the validity of that termination was made to the Labour Court, Cuddalore on 25.11.1989. The employer in the counter statement filed before that Court stated, inter alia, that it would lead evidence to prove the alleged misconduct. The Court without providing opportunity to the employer to lead evidence held that the termination of this workman was not justified.

2. The employer's writ petition challenging that order of the Labour Court has been allowed and the matter remitted back to that Court with a direction to permit the employer as also the workman to substantiate their respective cases. The learned single Judge, while so allowing the employer's petition has also directed it to pay subsistence allowance to the workman as per law from the date of his suspension and to settle the arrears of subsistence allowance payable to the workman within thirty days. That order was made on 13.12.2000. The employee being aggrieved by that direction is in appeal.

3. Learned counsel for the appellant submitted by counsel that the direction given for payment of subsistence allowance is one which cannot be sustained in law. It was pointed out that the workman had not applied to the Labour Court for interim relief under Section 10 (4) of the Industrial Disputes Act; that a case where no enquiry was held is on par with a case where the enquiry held is found to be defective; that the employer had a right to adduce evidence even though it had not held an enquiry prior to the date of termination; that the workman having ceased to be a workman of the employer on the date of termination the employer-employee relationship had been severed, and there was therefore no question of treating the employee as being under suspension. Subsistence allowance therefore, according to the submission, was not payable by the employer.

4. It was further submitted for the appellant that in the event the Labour court accepting the evidence adduced by the employer and upholding the termination such termination will relate back to the date of order of termination and, therefore, the severance of the employeremployee relationship takes effect from that date. It was submitted that it would be incongruous to treat such employee as being under suspension and to direct the employer to pay subsistence allowance even when such an employee would have ceased to be the employee of this employer.

5. Learned counsel, in support of his submission invited our attention to the decision of the apex Court in the case of Associated Corporation of Industries (India) Pvt. Ltd. Vs. Additional Commissioner for Workmen's Compensation (1972-1-LLJ 108), wherein the Court, inter alia, held that the employer's rights are the same in case of a defective enquiry as also in case where no enquiry had been held and that in both situations, the employer would have a right to adduce evidence before the Labour Court in support of the charges made against the employee.

6. The decision of a three judge bench of the Apex Court in the case of Punjab Dairy Development Corporation Ltd and another vs. Kala Singh etc. (1997-2-LLJ 1041), wherein it was held that when an order of termination is upheld by the Labour Court on the basis of the evidence recorded by it, that order of termination would relate back to the date on which it was issued by the employer was also relied upon. Learned counsel also referred to the decision of a Division Bench of this Court in the case of Ashok Leyland Ltd. v. Labour Court 1988-1LLN, 302, wherein the Court held that the award made by the Labour Court awarding wages to an employee, whose termination had been upheld by it, was not in conformity with law as the termination would relate

back to the date of termination as fixed by the employer, and not from the date on which the Labour Court had held the termination to be lawful.

7. Learned counsel also relied on the observation made by the Supreme Court in the case of M.Paul Anthony vs. Bharat Gold Mines Ltd. (19 99 (3) SCC 679) wherein the effect of non-payment of subsistence allowance in case of an employee of a public sector company was pointed out. That was a case where an employee had been suspended from service and during the period of enquiry subsistence allowance had not been paid to the suspended employee against whom there was also a criminal case pending in the criminal court. The court held that when an employee is suspended there is no severance of employer-employee relationship and that the term 'subsistence allowance' has an undeniable penal significance, as had been pointed out by the court earlier in the case of O.P.Guptha v. Union of India (1987 (4) SCC 328).

8. In this case, there is clearly no basis for awarding subsistence allowance as the employee is not under suspension, his services having been terminated by the employer. That order of termination is a good order until set aside by a competent court. The question as to whether the order is at all required to be set aside is matter which is now pending consideration by the Labour Court.

9. Learned counsel for the employer has informed us that after the order of the learned single Judge further proceedings have been taken before the Labour Court and that witnesses have been examined for the management. It was also pointed out to us on the basis of what had been stated in the additional affidavit, that the Unit in which the employee had been employed was closed in the year 1996.

10. The employee has been out of employment now for a period of over fourteen years. Had the employee accepted the order made by the employer and had not chosen to question the same by seeking reference that order certainly would have become final. But, once the reference is made an obligation is cast on the employer to adduce evidence if it wants to sustain that order, as, in the event of the employer failing to adduce evidence and to show that there was in fact a misconduct which would justify the termination of service, the employee would become entitled to the relief that he was seeking by having the reference made.

11. When the enquiry is to be made before the Labour Court the evidence that the employer may choose to produce would have to be countered by the workman. During this period when the employer is asserting a right to adduce evidence against the workman not in the domestic enquiry but before the Labour court for the first time, the employee's position is in reality no different from what it would have been had he been subjected to a domestic enquiry prior to the termination of his employment. The object of paying subsistence allowance, as has been pointed out by the Apex Court is to enable the employee to subsist during the time when the employer-employee relationship continues and enquiry against him is pending.

12. While it would be inappropriate to term any payment directed to be made during the period the reference is pending as 'subsistence allowance' a direction to pay an amount calculated on the same basis as subsistence allowance is calculated, having regard to the situation in which the employee is placed, is not beyond the competence of the court when it directs the remand of the matter to the Labour Court for enabling the employer to adduce evidence against the workman.

13. While we sustain the direction given by the learned single Judge to the employer to pay the amount which has been termed as ' subsistence allowance' which in reality is not a subsistence allowance but is in the nature of interim relief to the workman, we modify the direction given and limit the period for which the employee has to be paid that amount from the date of the order of the learned single Judge viz., 13.12.2000, till the conclusion of the proceedings before the Labour Court.

14. We are not unmindful of the fact that according to the employer the unit has been closed down in the year 1996. If the Labour Court were to find that the workman's service had been wrongly terminated and that he is entitled to reinstatement, he would be entitled to the benefits of service for the period during which he was wrongfully kept out of employment and would also be entitled to closure compensation. The amount now permitted to be paid will be set off against the backwages if awarded ultimately by the Labour Court. The order of the learned single Judge shall stand modified to this extent. The amount shall be paid within six weeks from today.

15. The Labour Court shall dispose of the reference within the next four months as it has been pending before it for a long period of time. The workman shall co-operate and shall ensure that the matter is not delayed on account of any act of omission or commission on his part.

Index: Yes
Website: Yes

To
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Cuddalore.

2.The Secretary,
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Workers Union,
Auroville-605 101.

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